Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

FLORENCE ZSCHACH AND MARYLOU ZSCHACH

Petitioners,

v.

LUCAS PRENDERGAST ALBRIGHT NEWMAN & GIBSON
and
ROBERT E. ALBRIGHT

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For Franklin County, Ohio

PETITION FOR WRIT OF CERTIORARI

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103 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial judge – who in another case had ruled a zoning ordinance to be valid – transgressed Petitioners' constitutional rights to due process of law by failing to disqualify himself from being the fact-finder in a case where Petitioners' claim for relief – not directly, but collaterally – involved the transparent invalidity of the same ordinance by reason of newly discovered fraud.

2. In a case with indisputable political implications, whether Petitioners were deprived of due process of law where a trial judge, in effect, reviewed a decision which *he* – and not some other fact-finder – had previously made in favor of a political group, where Petitioners were not parties in the previous case.

PARTIES TO THE PROCEEDINGS

Petitioners herein are Florence Zschach of Perry Township, Franklin County, Ohio and her daughter, Marylou Zschach of Columbus, Franklin County, Ohio.

Respondents herein are Robert E. Albright of Upper Arlington, Franklin County, Ohio, and his law firm, Lucas Prendergast Albright Newman & Gibson, of Columbus, Ohio.

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The following appear in the Appendices hereto:

A. September 12, 1996 decision of Court of Appeals of Franklin County, Ohio in affirmance of November 30, 1995 judgment of common pleas court, Lazarus, J., dissenting in part;

B. January 15, 1997 Ohio Supreme Court order dismissing Petitioners' discretionary appeal of aforesaid appellate decision, as not involving any substantial constitutional question;

C. February 26, 1997 order of Ohio Supreme Court denying Petitioners' Request for Reconsideration of the aforesaid order;

D. November 30, 1995 entry of Judge Sheward of common pleas court granting Respondents judgment in amount of $30,893.84 with interest from December 1, 1993, dismissing Petitioners' counterclaim, and dismissing Margaret Slone [sic] as a party defendant;

E. November 30, 1995 Sheward findings of fact and conclusions of law supporting judgment entry immediately preceding;

F. October 26, 1994 decision of Judge Sheward, granting Petitioners' motion to join Respondent Robert E. Albright as plaintiff, but denying motion to join themselves so that they could counterclaim as individual defendants, and not merely as trustees;

G. April 25, 1995 Judge Sheward's decision and entry denying motion of Petitioners to adjust clerk's original case schedule;

H. April 25, 1995 Judge Sheward's decision and entry denying motion for leave to amend counterclaim to request a jury;

I. July 12, 1995 entry of court of appeals, denying review of the jury question, for lack of final appealable order;

J. August 9, 1995 entry of aforesaid court of appeals denying reconsideration of its prior order;

K. October 11, 1995 Judge Sheward's decision and entry denying Petitioners' motion to dismiss (or transfer) for lack of subject matter jurisdiction;

L. July 30, 1993 Sheward opinion in *Hampton Lane Homeowners Association v. City of Upper Arlington*, Franklin County Common Pleas, 93 CVH 06-4488, unreported. This opinion, although not entered in the case at bar, is the most important of all opinions listed, since anticipatory judgment was formulated therein;

M. Respondent's May 4, 1995 acknowledgment that Sheward does not intend to recuse himself, as orally requested by Petitioners' counsel on April 5, 1995

JURISDICTION

This court's jurisdiction is being invoked under 28 U.S.C. 1257.

On September 12, 1996, the Franklin County Court of Appeals entered judgment against Petitioners. The order

of the Ohio Supreme Court, dismissing discretionary review of this judgment was entered on January 15, 1997. Motion for reconsideration thereof was denied by said Supreme Court on February 26, 1997. This petition for Certiorari is being filed within 90 days of the latter date.

The federal question essentially concerns judicial bias which is a matter of constitutional due process of law. It was first raised on April 5, 1995 when Petitioners' counsel, John F. Heath, orally requested that Judge Richard S. Sheward recuse himself from this particular case and the federal question was decided by his refusal to recuse himself, as admitted by Respondents in Appendix M herein. Further attempts to circumvent the effects of anticipatory judgment are exemplified by Petitioners' request for a jury trial and their motion to dismiss for lack of jurisdiction over the subject matter.

Before the Court of Appeals, (herein the "Petree court") the federal question was expressly raised in Assignment of Error #1, in *his verbis*: "The Court erred in not recusing himself from this case." Judicial impartiality is an ingredient of due process of law and according to Canon 3(C)(1) of the Ohio Code of Judicial Conduct a judge *must* recuse himself if his impartiality is reasonably questioned. The federal question was also implicitly raised in Assignments of Error #2, #3, #4, #5, #10 and #13, insofar as the assigned abuse of discretion was the result of judicial bias.

As to Assignment of Error #1, the Petree court was silent as to whether Sheward erred in not recusing himself from the case. Petree did remark, however, that only

the Chief Justice of the Ohio Supreme Court could mandate disqualification. As to other assignments of error, the Petree Court held there was no harmful abuse of discretion.

CONSTITUTIONAL PROVISIONS

I. Fifth Amendment to the United States Constitution.

II. Section 1 of the Fourteenth Amendment to said Constitution.

STATEMENT OF THE CASE

Rule 10 of this court cautions that a petition for a writ of certiorari is rarely granted when the error is asserted to consist in erroneous factual findings. However, if it becomes clearly evident that a fact-finder does not have a passion for the truth in a particular case, then fiction is perpetuated each time a reviewing court defers to the so-called discretion of the fact-finder. The manifest weight of the evidence establishes such judicial bias in the case at bar as to have deprived Petitioners of due process of law. Therefore, it is necessary to recite the events in some detail, so that the Supreme Court can perceive that the circumstances herein really present a legal issue.

In 1992 CompuServe, Inc. (herein "CompuServe"), a computer firm, had its principal place of business in the City of Upper Arlington. It employed about 1,000 workers and was responsible for 20% of the tax revenue of this city of 35,000 persons, the most populous suburb

of Columbus, Ohio. The firm was growing rapidly and needed room for expansion. If it expanded inside Upper Arlington it would result in $244,000 additional taxes by the year 1996 and by the year 2010 an additional $2.3 million. The nearby city of Hilliard was also aware of this growth and its mayor was ready to give "the sun, the moon, & the stars" in order to snatch CompuServe away from Upper Arlington. CompuServe officials were delighted with this municipal rivalry.

A dilemma existed for Upper Arlington, since no suitable room existed for CompuServe to expand within the city. However, in adjoining Perry Township twenty-nine acres of real estate were being offered for sale to residential bidders, one of whom – Summit Properties, Inc. of Charlotte, North Carolina – had offered $3 million. It was owned by the Clara Wirthman Trust. Trustees were Petitioner Florence Zschach and her two daughters, Petitioner Marylou Zschach and Margaret Ann Sloan. Marylou Zschach (hereafter "Marylou") was the spokesperson for the trust in the negotiations for sale.

Attorney Robert E. Albright (hereafter "Albright"), who dealt with municipalities "all the time" during his forty plus years as a lawyer, was engaged by Upper Arlington to persuade the trustees to tender their land to CompuServe. He gained their confidence by boasting about his reputation for preventing commercial use of land and then, after being hired by them, double-crossed them into signing a contract with CompuServe. Contract terms required annexation into Upper Arlington, followed by rezoning of the land for commercial use. Later, through the efforts of Attorney Dan Gunsett Petitioners established that the contract had lapsed by its own terms.

However, great damage had been done to Petitioners, since the city refuses to re-zone the land back to residential use. In the meantime CompuServe received an irresistible offer from Hilliard and relocated in that city. Seething with rage, Upper Arlington officials have resolved that the land will have no value to Petitioners, unless it is sold to a commercial entity producing revenue for the city, or condemned for that purpose.

Albright's single-minded aim and purpose had been to get CompuServe committed to Petitioners land before it went to Hilliard. That would have been splendid, had Petitioners wanted a commercial entity on their land; but it was important that the elderly Zschachs dwelt in comfort and according to their accustomed manner of living in a quiet residential neighborhood. Florence Zschach had been there for sixty-one years. By thus compelling the CompuServe contract, Albright betrayed trustees. He became an independent tortfeasor, his outrageous conduct completely severing the attorney-client relationship.

Compuserve made an offer for the land in July 1992, but the trustees never responded, since they wanted residential developers. Realizing Marylou's ardent love for her parents and their welfare, Albright used imminent danger to her parents as an incentive to negotiate with CompuServe. In early November 1992 he startled her with the news that there would be a midnight city council meeting that very day to condemn the land and that in thirty days her parents would be "thrown out on to the street." He summoned Marylou first to the city office for discussion. Later at his office and in her presence he phoned some pretended Upper Arlington "official" and received the assurance, so he said, that city council might

cancel the midnight meeting, if Marylou immediately negotiated with CompuServe. *This was a lie.* Albright knew that there was no "midnight meeting" and no danger of condemnation or eviction, near or distant.

Marylou, trustfully looking to Albright for advice and not realizing that he was engaged in exquisite "play-acting", produced a counteroffer.

In his findings of fact (Appendix E), without explaining *why*, Judge Sheward, regarded the following account of those November 1992 events as "not credible." Marylou testified:

> "I was at my office, and Bob called me and he told me that I had to get – to get over to the city office again, and I had to get there right now. And I said, 'I can't. I'm working. I'm doing something very important. I just can't walk out of here.' . . . And so when I told him I wasn't going to go, that they need to make an appointment or something because I was doing something, I just couldn't walk out. I have a job. And he said, 'Well, you have to go, because they're going to have an emergency midnight meeting to condemn your parents' property and home tonight.' "
>
> ". . . . I said, 'Bob, they can't do that. We're not even in Arlington.'. . . . He said 'Oh yes, they can, hell, yes, they can.' . . . I left my office. When somebody calls you and tells you they're going to take your land away by eminent domain by midnight, you make an excuse. You get out of there . . . "
>
> "I met Mr Albright in the lobby, and he said that we had to talk with Sharon Pfancuff, who is

> the city attorney, who I had never met prior to that time. And he said that we had to go talk to her and we had to talk quick, you know, because all this was coming down, and that she and Richard King were trying desperately to hold the city council off of this."
>
> "Well, I was in tears, I kept saying, 'I can't believe they can do this. I can't believe they can do this.' And he kept saying, 'They're going to do it, baby, You better move it. You got to get into this contract and you got to do it now.' " " . . . I was crying and I was saying,' They can't do this. They can't do this.' He said give my parents 30 days to get out of the property if they took it by eminent domain. I kept saying, 'I cannot believe they can do this.' And he said, 'You were just talking to the city attorney. They can do it and they're going to do it, and you don't care about your parents' " (November 6, 1995 Trial Transcript Pages 189-192).

In his findings of fact Judge Sheward failed to note that witness James Graham also heard Albright's reference to "*that* meeting."

As negotiations proceeded and offers went back and forth, Petitioners still expressed great reluctance to finalize a contract with CompuServe. Albright persevered in the deception by saying: "We've got to appease the city, by making counteroffers to CompuServe. Later on, we can get out of it and begin to deal again with the old bidders. Right now we just want to keep your folks from being evicted." He pounded on the table to emphasize how serious the danger was to the elder Zschachs.

Several months after trustees signed the contract Marylou was discussing with Albright certain terms of the contract. She reminded him that she only signed the contract for fear of the eviction of her parents. Thereupon, Albright categorically denied that there had ever been threats of eviction and insisted to her that she had lost her mind. This was Marylou's first inkling that she had been duped. Later on, in a telephone conversation (which Marylou had prudently recorded) Albright, caught off guard, admitted that she had indeed been duped.

In May 1993 Marylou, as spokesman for the trust, orally terminated Albright, but he refused to go, stating: "This deal is going to go through with or without you", thereby showing his utter contempt for his obligation to represent Petitioners' interests. In order to paralyze her – a lay person – from taking any resolute action, he threatened to go to Probate Court to remove her and her mother, Florence Zschach, as trustees. This maneuver had the added effect of creating a division among the three trustees, inasmuch as trustee Sloan now obtained her own personal counsel.

At trial Albright's counsel attempted to demonstrate that Marylou was litigious and contentious and that she "shopped around" for lawyers, intimating that she had created the lawsuit. However, she was battling, not only Albright, but a powerful Ohio city whose officials were inflexibly determined that her parents' land existed primarily for the purpose of municipal revenue.

She finally found Attorney Gunsett of the Columbus firm of Baker & Hostetler, who duly established that the

CompuServe contract had lapsed by its own terms. This succeeded in stopping Albright. Then in November 1993 all three trustees asked him to return their client files in order that they might resume their attempts to sell the property to residential bidders hopeful that it was still possible, despite the change in zoning. Contrary to Ethical Consideration 2-31 of the Ohio Code of Professional Responsibility, Albright refused. Eighteen months later, upon demand of Petitioners' trial attorney, Albright admitted a possible ethical violation and yielded up the files. The admission of that possible code violation was a new fact, not previously pleaded by Petitioners, and in a supplemental pleading to Judge Sheward was made the basis of a jury demand.

After Lucas Prendergast Albright Gibson & Newman filed their fee suit in August 1994, the firm challenged Petitioners' attempt to join Albright as a "New Party Plaintiff." The firm averred that his wrongdoing, if any, had nothing to do with the firm's right to a fee. In point of fact, the fee suit (and everything connected with it, such as Albright's later move to foreclose on the judgment lien) was simply a subterfuge created to give the impression that Albright really was Petitioners' attorney and to dispel the infamy of his traitorous conduct. *The subterfuge was the main point of the fee suit.* The firm's attempt to exonerate Albright from personal liability on the counterclaim was only an afterthought.

In a bench trial before Judge Sheward in July 1993 Albright had been counsel for Upper Arlington in resisting the attempt by Hampton Lane Homeowners Association (hereinafter "*Homeowners*") to nullify and make void the zoning ordinance which had been enacted pursuant

to Petitioners' contract with CompuServe. In his decision Sheward wrote that there was conflicting evidence on the constitutionality of said ordinance. He properly held that legislative constitutionality is presumed and that *Homeowners* did not produce evidence sufficient to overcome this presumption (See Appendix L).

However, the reason that *Homeowners* did not meet this burden was that Albright, having learned that *Homeowners* had issued a subpoena for Marylou's testimony, warned her under threat of dire consequences (*"if you testify you'll be in violation of the contract and CompuServe will get the property for nothing, etc., etc."*) to avoid service thereof. If Marylou had testified, *Homeowners* would certainly have overcome the presumption of constitutionality, since the zoning ordinance was authorized pursuant to the contractual terms. If the negotiations with CompuServe were not voluntary, then there would be no valid contract, as Albright's counsel admitted in the fee suit.

When the fee suit was assigned to Judge Sheward, himself a citizen of Upper Arlington, a question arose as to his impartiality inasmuch as: (1) he had already formed an opinion on the validity of the zoning ordinance, and (2) having upheld Albright's position in *Hampton Land Homeowners Association v. Upper Arlington*, he now had Albright before him as a *party* seeking an attorney fee for legal work which involved, inter alia, formulating the same zoning ordinance which he had declared to be valid.

From the start it appeared that judicial economy and the rules of superintendence were far more important

than Petitioners' rights. Since their counterclaim involved a professional tort, with testimony expected of thirty witnesses (See Appendix O), the case should have been on a two-year track pursuant to his own Local Rule 37.03. They asked for an adjustment of the trial date, but he left the case on the one-year track, writing: "This is not complex litigation, and counsel's inability to focus on the issues presented is not a reason for a continuance." (See Appendix G)

Although Petitioners did not file an affidavit of prejudice with the Chief Justice pursuant to Ohio Revised Code Section 2701.03, they did everything else possible to obtain a trier of fact, other than Sheward. They orally sought his personal recusal which he refused. They pleaded a new fact which under Ohio law unquestionably revived the right to a jury trial. They appealed Sheward's denial thereof to the Franklin County Court of Appeals. They attempted to remove the case to Probate Court.

At a status conference, Petitioners' counsel John F. Heath asked Judge Sheward to soften his stance and to give a full hearing. His reply was that counsel could not focus on the issues. Sheward maintained that CompuServe and Upper Arlington were not issues in the case, even though they were prospective beneficiaries of Albright's interference with advantageous relations, which interference Petitioners had counterclaimed. For him, this case was the "easiest case known to man. It didn't need a jury. It was a 'no-brainer' "

Although his own Local Rule 23.02 permits a party (not a non-party) to be recalled to testify to *additional*

facts, he ignored the rule. He could have allowed Marylou to refresh her recollection by looking at her notes without committing harmful error. His conclusions of law were silent on the tort of "interference", apparently adopting Respondents' rule of law that an attorney has a *carte blanche* to interfere with his clients' previous advantageous relations. Petitioners articulately pleaded intentional infliction of mental disturbance, but Sheward ruled that Albright's activities allegedly in support of an attorney fee could not, in truth, be activities procedurally compelling a counterclaim in tort.

Most inappropriately Judge Sheward refused to listen to the phone audiotape wherein Albright admitted that Marylou had been duped. Sheward refused its admission ostensibly because it was not offered at the proper time; whereas in his discretion he could have admitted it at any time in furtherance of justice, pursuant to Ohio Revised Code Section 2315.01(D). At the close of the trial, as if eager and anxious to vindicate Albright and censure Petitioners, Sheward immediately announced his decision from the bench. In view of his unwillingness to hear dispositive proof of Albright's lie, his later ghost-written finding that Marylou's testimony on that point was not credible was a very unjust and wicked finding.

Whether proof of emotional disturbance was effectively foreclosed by Sheward's order of October 26, 1994 refusing to join Petitioners *as individual defendants* or whether it was still hypothetically available to Petitioners *as trustees*, at the end of the first day of trial (as noted by Judge Cynthia Lazarus in her dissent) Sheward, undersigned counsel, and Respondents' counsel all agreed that emotional distress was not a triable issue. Based on the October 26, 1994 order, Petitioners' counsel never

attempted to obtain expert medical testimony on the issue of emotional disturbance. Yet in the face of this understanding by the key figures, the appellate majority ruled that emotional disturbance *was* a triable issue.

Injudiciously, Judge Petree further remarked: " . . . there is no explanation as to how the case might be harmed or prejudiced by a failure to have the case tried to a jury." An appellate judge did not perceive what had happened!! *The facts speak for themselves.* There is no need for an explanation. The evidence recited herein and supported by the record is brim full of the harm that resulted from the bench trial before a biased decision-maker.

REASON FOR GRANTING THE WRIT:

I.

IT IS A DENIAL OF DUE PROCESS FOR A JUDGE NOT TO DISQUALIFY HIMSELF FROM BEING THE FACTFINDER IN A SUIT INVOLVING THE CLAIM OF AN ATTORNEY FEE WHERE THE BASIS FOR THE FEE, IN PART, WAS LEGAL WORK PERFORMED IN FORMULATING A ZONING ORDINANCE WHICH ORDINANCE THE JUDGE HAD PREVIOUSLY HELD TO BE VALIDLY ENACTED, WHERE THE DEFENSE TO THE FEE CLAIM AND THE BASIS OF PETITIONERS' COUNTERCLAIM WAS THE INVALIDITY OF SAID ORDINANCE BY REASON OF NEWLY DISCOVERED FRAUD AND DECEIT ON THE PART OF THE ATTORNEY WHO OBTAINED FROM PETITIONERS THE CONTRACT AUTHORIZING ANNEXATION OF THE LAND AND THE ZONING THAT FOLLOWED.

The right to an impartial decision-maker is required by constitutional due process of law (*Arnett v. Kennedy*

(1973) 416 U.S. 134, 197, 40 L Ed 2d 15, 94 S.Ct. 1633). A biased decision-maker is constitutionally unacceptable in the United States of America and our system of law has always endeavored to prevent the probability of unfairness (*Withrow v. Larkin* (1975) 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L Ed 2d 712). There is no probability of unfairness where the biasing influence is remote and insubstantial. *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813. This influence is not insubstantial when the trier of fact pre-judges the evidence and says how he would assess evidence he has not yet seen or heard (*Allen v. Cuomo* (1996) 100 F3d 253, 259).

In addition to personal interest in the outcome of the suit (*Goldberg v. Kelly,* (1970) 397 U.S. 254, 271), a mind closed to the facts is not admissible in a judge (*Gibson v. Berryhill* (1973) 411 U.S. 564, 93 S.Ct. 1689, 36 L Ed 2d 488). Neither should a judge possess an unconscious motive for punishing somebody for exercising or not exercising the constitutional right to enter into a contract, as if that right demanded that some benefit be tendered to the government in exchange therefor (*Nollan v. California Coastal Commissioners,* (1987) 483 U.S. 825, 841, 9 L Ed 2d 677). Judge Sheward's award of $30,893.84 to Albright, unpretentiously, was *his* punishment to Petitioners for "preventing" CompuServe from being a source of revenue for Upper Arlington. His finding that Petitioners (Trustee Florence Zschach and Trustee Marylou Zschach) were personally liable in Respondents' fee suit against the three trustees, *but not Trustee Sloan* (who did not join in the compulsory counterclaim) was simply a retaliatory denial of equal protection of the law.

In prior arguments to reviewing courts, Respondents' "bombshell" has always been: "Judge Sheward found the facts to be different from what Petitioners say they are", not that there were any patent inconsistencies in *their* evidence. Judge Sheward named none. Essentially, his judgment for Respondents and against Petitioners is founded simply on his determination, on some unarticulated basis, not to believe them. Indeed, from the consideration of the evidence summarized herein, from the pleadings and motions, from the events before and during trial, there is no question but that Judge Sheward was determined to find in favor of Albright as a party, just as he found in his favor as counsel in *Hampton Lane Homeowners Association v. Upper Arlington.*

II.

IN A CASE WITH INDISPUTABLE POLITICAL IMPLICATIONS, PETITIONERS WERE DEPRIVED OF DUE PROCESS OF LAW WHERE OVER THEIR OBJECTION A TRIAL JUDGE, IN EFFECT, REVIEWED A DECISION WHICH HE – AND NOT SOME OTHER FACT-FINDER – HAD PREVIOUSLY MADE IN FAVOR OF A POLITICAL GROUP WHERE PETITIONERS WERE NOT PARTIES TO THE PREVIOUS CASE.

Tangentially, Petitioners were before the common pleas court seeking re-examination and review of the zoning ordinance because of *fraud in the inducement* which fraud, as a general rule, nullifies and makes void any engagements, commitments and obligations – whether contractual or not.

Federal judges who have moved up to the circuit court of appeals are not permitted to review rulings previously made by them in the district court (*Delaney v. United States*

(1924) 263 U.S. 586, 44 S.Ct. 206, 68 L Ed 462). The federal judicial code prohibits this because any sincere person is naturally motivated to uphold his own conclusions even in the face of resourceful, but not dispositive, legal argument. Federal law prohibits such review, even if the parties consent (*Cramp & Sons v. International C.M.T.* (1913) 228 U.S. 645, 57 L Ed 1003, 33 S.Ct. 722).

United States v. Giorgi ((1988) 840 F2d 1022, 1st Circ.) held that facts learned by a judge while acting in his judicial capacity cannot serve as a basis for disqualification for bias. However, in 1994 this United States Supreme Court ruled that pre-judgment of the facts need not in all cases have an extrajudicial source in order to establish bias; *the important thing is the predisposition of the judge* (*Liteky v. United States*, 114 S.Ct. 1147, 127 L Ed 2d 474). If the predisposition of the judge is so extreme as to display a clear inability to render a fair judgment, then it is transformed into the "pervasive bias" exception to the extrajudicial source doctrine set forth in 28 U.S.C.A. 144 and 455. Counsel submits, on the ground of constitutional due process of law, that this reasoning also applies to state judges.

Judges are to be independent and to be able to decide cases, oblivious to consequences, either favorable or unfavorable (*Pierson v. Ray* (1967) 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L Ed 2d 288; *Evans v. Gore* (1920) 253 U.S. 245, 251. Imagine an arbiter in the position of Judge Sheward. Here is a young jurist, with less than ten years tenure as a judge, a citizen of a city which lost their chief tax revenue source. He is asked to pass upon a fee request of a lawyer who has been dealing with municipalities "all the time" for over forty years. This lawyer was the

acknowledged protagonist of the so-called contract with CompuServe, the annexation which followed, and the zoning ordinance which he championed before Sheward in *Hampton Lane Homeowners Association*.

If this arbiter's findings of fact cannot be completely disassociated with his feelings – if he cannot keep an open mind as to Petitioners' claim of fraud – constitutional due process of law mandates that he withdraw from the case.

CONCLUSION

A judge's impartiality hinges on whether he was moved to his decision by the evidence before him. That is the question. Was Judge Sheward moved to decision by the evidence before him? Did he have a passion for the truth? Or was he resolved to assess in a certain way evidence which he had not yet seen or heard? The accumulation of evidence of record indicates that he was so resolved. His mind was already made up. This, for example, is why he refused to assess the worth of the phone audiotape recording. The supposed violation of the Rules of Evidence simply gave him an opening.

Judge Sheward had the authority to rule on his own recusal (*United States v. Giorgi*). He thereupon ruled that he need not recuse himself, thus deciding the federal question very early in this litigation. The events that followed demonstrate that, on federal due process grounds, he should have recused himself.

For all of these reasons a writ of certiorari should issue to review the decision and order of the Court of Appeals of Franklin County, Ohio, *and* the decision not to recuse himself made by Trial Judge Richard S. Sheward of the common pleas court of said county.

Respectfully submitted,

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